VERMONT ENVIRONMENTAL BOARD
10 V.S.A. ch. 151

Re: Lawrence White
RR Box 45A1
Danhy, VT 05739

Land Use Permit Amendment
#1R0391-8-EB

MEMORANDUM OF DECISION
ON MOTIONS FOR REHEARING AND TO ALTER

This decision pertains to post-decision motions filed on May 18, 1998, by John D. Hansen, Esq., counsel for Lawrence White ("Permittee"), seeking a rehearing of the above-captioned appeal and alterations to the April 16, 1998, decision and permit conditions imposed by the Environmental Board ("Board") in authorizing a land use permit application for commercial activities on the Permittee's property in the Town of Danby, Vermont. As is explained below, the Board denies the Permittee's Motion for Rehearing on the basis that it has no authority to grant such a motion and, even if it did, the Permittee does not state grounds sufficient to require a rehearing. The Board also denies the Permittee's Motion to Alter because he asks the Board to consider matters which are not properly within the scope of Environmental Board Rule ("EBR") 3 1 (A). The Board believes that the hearing afforded the Permittee was fair and comported with due process and that the Board's findings of fact and conclusions are supported by the law and the evidence.

I. SUMMARY OF PROCEEDINGS

On September 23, 1997, the District #1 Environmental Commission ("Commission") issued Land Use Permit #1R0391-8-EB ("Dash 8 Corrective Permit") and supporting Findings of Fact, Conclusions of Law and Order ("Dash 8 Corrective Decision"). The Permit authorized the Permittee to operate an office, a maintenance building, a firewood processing area, and a radio tower ("Project"), all buildings and uses previously established at the Permittee's %-acres tract of land on U.S. Route 7 and Town Highway 19 in the Town of Danby, Vermont ("Project Tract").

Acting on an appeal filed by the Permittee from certain conditions contained in the Corrective Permit, the Board issued Findings of Fact, Conclusions of Law, and Order on April 16, 1998 ("Dash 8 Decision"). On that same date, the Board issued Land Use Permit #1R0391-8-EB, with conditions substantially similar to those imposed by the Commission ("Dash 8 Permit"). The Dash 8 Decision and Permit are incorporated by reference herein.

On May 18, 1998, John D. Hansen, Esq., entered his appearance for the Permittee and filed with the Board a Motion for Rehearing and a Motion to Alter. The Motion to Alter was filed pursuant to Environmental Board Rule ("EBR") 3 1 (A).

On May 22, 1998, Chair Marcy Harding issued a memorandum to the parties stating that responses to the motions were due on June 2, 1998, and advising the parties that the Board would deliberate on June 24, 1998.

On May 28, 1998, Stephanie Kaplan, Esq., counsel for the Danby Protective Association ("DPA"), sent a letter to the Chair on behalf of the DPA and George and Alice Araskiewicz, William Buckman, Celia Hayward, Harris and Susanne Peel, and Kenneth and Christine Rush (collectively, the "Neighbors"). She indicated that the Permittee's motion had not been filed with all the parties to the proceeding and requested an extension of the filing deadline to June 11, 1998. This was followed by a similar request from party Harris Peel on June 1, 1998. Also, on June 1, 1998, the Permittee filed a letter in which he indicated that he did not object to the requested extension and asked for an opportunity to tile a rebuttal memorandum. On June 1, 1998, the Chair issued an Extension Order in which she established a new deadline of June 11, 1998, for responsive memoranda, and denied the Permittee's request.

On June 11, 1998, Ms. Kaplan, on behalf of DPA and the Neighbors, and Harris Peel, each filed responsive memoranda to the Permittee's motions.

The Board deliberated with respect to the Permittee's Motion for Rehearing and Motion to Alter and the other parties' responsive memoranda on June 24 and July 22, 1998. Any specific requests contained in the Permittee's motion which are not discussed below are denied.

III. ISSUES

1. Whether the Permittee's Motion for Rehearing should be granted.

2. Whether, under EBR 3 l(A), the requests in the Motion to Alter are appropriate for the Board's consideration.

3. Whether to reconsider any items appropriately raised in the Permittee's Motion to Alter, and if so, whether to alter the Dash 8 Decision and Permit.

III. DISCUSSION

A. Motion for Rehearing

The Permittee asks the Board to vacate its Dash 8 Decision and hold an entirely new

hearing on his appeal. The reason for seeking such relief is "to prevent a serious miscarriage of justice." The Permittee's attorney offers no citation to any statute or Board rule that empowers the Board to convene such a new hearing, relying instead on the proposition that it is an "inherent discretionary power" of an agency to open, correct, modify or vacate its own judgments.

A public administrative authority has only such powers as are expressly granted by the Legislature, together with those powers implied as necessary for the full exercise of those expressly granted. New Hamnshire-Vermont Physician Service v. Commissioner. Dept. of Banking and Ins., 132 Vt. 592 (1974). The Board is required to follow both the standards established by the Legislature and the procedures which the Board has adopted to carry out its statutory mandate. In re Killington. Ltd., 159 Vt. 206 (1992).

The Board has adopted procedural rules that allow it in limited circumstances to reopen a proceeding. Pursuant to EBR 20(A), the Board may reopen a proceeding to supplement the record with "new" evidence. However, the Board uses this power sparingly, and it may decline to grant a party's request to reopen a proceeding to supplement the record where a party had an opportunity-to offer such evidence at hearing and it failed to do so. Re: Mt. Mansfield Co.. Inc., #5L1125-4-EB, Findings of Fact, Conclusions of Law, and Order at 3 (Jun. 15, 1995) [EB #573]. Additionally, the Board may revisit and alter its decision, pursuant to EBR 3 1 (A), based upon the existing record, but this procedure is not available to a party who was or should have been aware of permit conditions likely to be imposed or the use of procedures before a final decision was issued. Re: Nehemiah Associates, Inc., #1R0672-1-EB, Memorandum of Decision at 2 (Oct. 3, 1995). See also discussion, infra, starting at 8.

There is no statute or rule which allows the Board to rehear an appeal in its entirety once a final decision has been rendered. The statutory scheme of Act 250 anticipates that review of the Board's procedural and substantive decisions, including the reasonableness and sufficiency of the conditions attached to a land use permit, are to be conducted by the Vermont Supreme Court. 10 V.S.A. $6089(b) and (d). If the Court determines that the Board has erred in applying a legal standard, in failing to make sufficient findings to support its conclusions, or with respect to other procedural or substantive matters, the Court may reverse and remand the matter to the Board with instructions for further hearing. See. e.g., In re Nehemiah Associates. Inc., Docket No. 95-561 (Dec. 6, 1996).

Accordingly, the Board concludes that it has no authority to grant the Permittee's request for rehearing and, therefore, the Permittee's request is denied. Nevertheless, even if the Court were to conclude that the Board has the implied power to rehear an appeal, the Board concludes that the Permittee has not raised arguments warranting a rehearing of this matter.

In support of his request for rehearing, the Permittee recites a series of alleged substantive and procedural errors that fall into two main categories: errors allegedly flowing from the Chair's decision (and then the Board's) to exclude certain exhibits offered for admission by the Permittee; and errors that are apparently derived from the Permittee's decision to retain a lay representative who allegedly provided inadequate representation in this appeal and the Board's ruling not to postpone the hearing in order to allow the Permittee to retain legal counsel. As a consequence of these errors, the Permittee asserts that the Board imposed permit conditions that will ostensibly put the Permittee "out of business." Motion for Rehearing at 5-6, No. 15.

1. Official Notice

The Permittee's first claim of error is that the Board excluded exhibits which the Permittee believed had been officially noticed and therefore admitted at the time of the pre-hearing conference. The Permittee specifically identifies Exhibits A-l, A-2, A-6, A-7, A-12 and A-14, which were prefiled by the Permittee, objected to by the Neighbors, and ruled upon by the Chair at the second prehearing conference held on February 17, 1998. Motion for Rehearing at 1-3, Nos. l-8. These rulings were adopted by the Board at its hearing on February 18, 1998.

The Permittee's allegations do not accurately reflect the record of this proceeding. Exhibit A-l was withdrawn by the Permittee. Exhibit A-2 was admitted with the exception that Question and Answer #16 was struck. Exhibit A-6 was not admitted as an exhibit because it was deemed to be legal argument rather than testimony. However, the Permittee was specifically advised that he could offer this document as argument at a later stage of the proceeding and the Board did consider it. Exhibit A-12 was not admitted because it was irrelevant. This exhibit is purported to be a partial transcript of one of the Commission's hearings on the Dash 8 Corrective Permit. Because the Board conducts de novo proceedings, the testimony heard by the Commission is not relevant to the Board's consideration of the issues on appeal.

Exhibit A-7 and the excluded answer to Question #16 of Exhibit A-2 both relate to the sound measurement reports prepared by Audiology Associates, Inc. The Permittee argues that both exhibits should have been officially noticed by the Board consistent with Item 2 of the Prehearing Conference Order. Item 2 stated:

> The Board takes official notice of the Revocation Permits and supporting decisions. The Board also takes official notice of all exhibits admitted by the Comrnission in these proceedings.

The Revocation Permits are Permits #1R0391-3 ("Dash 3 Permit"), #3R0391-4 ("Dash 4 Permit"), #3R0391-5 ("Dash 5 Permit"), #3R0391-5A ("Amended Dash 5 Permit"), #3R0391-6

("Dash 6 Permit"). These permits, which authorized the construction or conversion of the various buildings on the Project Tract and allowed several of the Permittee's commercial uses, were revoked by the Board but subject to an opportunity to correct. Re: Lawrence White, # 1 R039 1 -EB et seq. (Revocation) and Re: Lawrence White, # 1 R039 l -7-EB (Interlocutory), Findings of Fact, Conclusions of Law, and Order (Sept. 17, 1996) ("Revocation Decision") [#647]. The Board expressly stated in its Revocation Decision that if the Permittee timely filed an application with the Commission and the Commission issued a land use permit for the Project, the Revocation Permits would be superseded by this new land use permit. The Permittee in fact timely applied for and was issued the Dash 8 Corrective Permit now under appeal.

No party objected to Item 2 of the Prehearing Conference Order. However, even if the Board were to construe Item 2 of the Prehearing Conference Order such that it would allow the Board to take official notice of all exhibits from the Commission's Revocation Permit files, Exhibit A-2 would not fall within the ambit of this provision. Exhibit A-2 is the prefiled testimony of the Permittee, prepared for the Environmental Board proceeding, and dated December 2, 1997. It therefore could not have been an exhibit admitted by the Commission in the proceedings involving the Revocation Permits. Answer #16 was objected to by the Neighbors and ruled inadmissible because it contains hearsay. It also lacked the proper foundation. In Answer # 16, the Permittee refers to the 1990 sound test. The Permittee did not personally gather the audiology measurements referred to in the testimony, and he did not call as his witness a person from the firm of Audiology Associates, Inc., which conducted the tests, even though the Permittee identified the firm in his initial witness list filed on October 7, 1997, with his Notice of Appeal. Consequently, there was no qualified witness to testify before the Board concerning recorded noise levels at the Project Tract, based on sound tests taken in 1990 or at any other time.

For similar reasons Exhibit A-7 was excluded. This document consists of a report of audiology measurements conducted by Audiology Associates, Inc., in 1990, and was offered by the Permittee in support of his request to operate a rock crusher at the Project Tract. This document was admitted as an exhibit and considered by the Commission on March 25, 1997, in the Dash 8 Corrective Permit proceeding. See Dash 8 Decision, Exhibit List at page 4, Commission Exhibit #80. Although the Commission did consider exhibits from the Revocation Permit files, including documents filed from Dash 4 Permit file related to the application for crushing, processing and stockpiling of gravel, it did not identify a report from Audiology Associates, Inc., as one of those exhibits. See Dash 8 Decision, Exhibit List at page 3, Commission Exhibits #61 and #62. While it is possible that the Permittee may have prepared the sound tests in preparation for the Dash 4 permit proceeding, the decision from that proceeding does not contain a reference to a report by Audiology Associates or to testimony by a member of that firm. Moreover, the Permittee did not provide the Board with a copy of an exhibit bearing the Commission's exhibit number or other indicia that it was a complete exhibit from the Commission's permit files.

Additionally, Exhibit A-7 is not the type of document that the Board could officially notice. Under the Vermont Administrative Procedure Act, 3 V.S.A. § 8 1 0(4), the Board may only take official notice of "judicially cognizable facts." Under the Vermont Rules of Evidence, V.R.E. 201(b) a "[j]udicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court [administrative agency] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." An agency may take official notice of judicially cognizable facts whether requested or not and may do so at any stage of a proceeding, but if the agency takes notice on its own motion, it must provide the parties with an opportunity to be heard after notice has been taken. V.R.E. 201; see also In re Handy, 144 Vt. 610 (1984).

The Environmental Board regularly takes official notice of its own permits and decisions, those of District Commissions, and the orders of courts of record in this State. Furthermore, 3 V.S.A. § 810(4) allows an agency to take notice of "generally recognized technical or scientific facts within the agency's specialized knowledge." However, emphasis must be placed on the words "generally recognized" since technical and scientific facts which are subject to dispute are not appropriate candidates for official notice. Occasionally the Board will take official notice of exhibits from District Commission files where those exhibits are clearly uncontested -- for example, where the parties have jointly stipulated to their inclusion in the record of an appeal. See Re: Stratton Corporation, #2W0519-9R3-EB, Findings of Fact, Conclusions of Law, and Order (Jan. 15, 1998) [#688]. However, where an exhibit contains technical or scientific facts that are subject to dispute, and a party clearly objects to its admission, such an exhibit cannot be officially noticed.

As the Neighbors have correctly noted, the Board has no authority to take official notice of any and all exhibits contained in a District Commission's file. Indeed, while Item 2 of the Prehearing Conference Order states that the Board would take official notice of all Revocation Permits and supporting decisions and also exhibits admitted by the Commission in the related proceedings, it did so with the understanding that the Neighbors could and would likely raise objections to the admissibility of certain specific exhibits on relevancy and other grounds. See Preheating Conference Report and Order, Section IV(A) at 3 (Nov. 10, 1997) and Order at 7, Item 12. Moreover, the Chair specifically did not take official notice of any of the exhibits offered by any parties in the Dash 8 Corrective Permit proceeding before the Commission, precisely because of the de novo nature of the appeal before the Board.

As noted above, the Permittee identified Audiology Associates, Inc., in its preliminary list of witnesses when it filed its Notice of Appeal on October 7, 1997. The Permittee obviously understood that sound tests would likely be a subject of importance to be discussed in the context of Board review of Criterion 8 (noise) and Corrective Permit Conditions 11 (establishing a

decibel limit for noise for Project activities), 5 (limiting the hours of operations), and 6 (prohibiting use of a rock crusher). However, the Permittee elected not to prefile testimony for a representative from Audiology Associates, Inc. Therefore, Exhibit A-7 lacked a sponsoring witness who could testify to its meaning and relevance in the Dash 8 Permit proceeding and be available for cross-examination by the Neighbors.

The Board concludes, therefore, that it was not error for the Board to exclude Exhibits A-1, A-2, A-6, A-7, A-12 and A-14, as they were not within the ambit of Item 2 of the Prehearing Conference Report and Order and for other reasons discussed above. While the Board understands that the Permittee objects to the permit conditions imposed by the Board and a new hearing could provide him with an opportunity to offer additional evidence in support of his application, the Permittee has not directed the Board to any authority supporting a rehearing of this matter.

2. Inadequate Representation

The Permittee's second claim of "error" may be described as the "inadequate counsel defense." The Permittee argues that Nancy Brown, the Permittee's employee, lacked sufficient knowledge, training and experience to deal with a case of the complexity of this appeal and, as a result, the record is replete with "strategic and tactical errors which were detrimental to [the] Permittee." Motion for Rehearing at 3-4, Nos. 8-14.

EBR 14(D) specifically leaves to each party the choice of a representative in an Act 250 proceeding. The rule makes clear that a representative need not be a lawyer. EBR 14(D) states in relevant part:

> A party to a case before the board or a district commission may appear in person, or may be represented by an attorney or other representative of his choice. (Emphasis added.)

In 1985 the Legislature ratified the Board's Rules of Procedure, including EBR 14(D), such that they have the same effect as any law passed by the Legislature in the first instance. In re Barlow, 160 Vt. 5 13,521 (1993); In re Spencer, 152 Vt. 300,336 (1989). Moreover, the Board has previously construed this provision and determined that the so-called f'lawyer-representation rule" applicable to court proceedings, is not controlling in Act 250 proceedings. Re: Northern Develonment Enterprises, #5W090 1 -R-5-EB, Memorandum of Decision at 4-5 (Aug. 2 1, 1995) [#627]; cf. Vt. Agency of Natural Resources v. Upper Valley Regional Landfill Corn., 159 Vt. 454 (1992).

Contrary to his counsel's assertion, the Permittee was not pro se in this appeal. The

Permittee was represented throughout the proceeding, and, for that matter, in the earlier Commission proceeding by Nancy Brown, the Permittee's employee. Indeed, a review of the Commission decisions supporting issuance of the Revocation Permits reveals that Ms. Brown had served as the Permittee's representative in other Act 250 proceedings, including those involving the Dash 4, Dash 5, and Dash 6 Permits. Therefore, Ms. Brown had some knowledge of and experience with the Act 250 permitting process.

Although the Permittee initially included with his prefiled exhibits a Notice of Appearance (Exhibit A-l) purporting to name a civil engineer, Ellis Speath, as his representative in this proceeding, neither Mr. Speath nor any attorney ever appeared before the Board or its Chair as the Permittee's representative in this proceeding. A review of the Dash 3 Permit decision reveals that the Permittee had previously retained John Kennelly of the firm Carroll George and Pratt to represent him. In addition, the Permittee previously retained attorney Jon Readnour, formerly of the same firm, in the Board's Revocation proceeding. See Re: Lawrence White, #1R0391-EB et seq. (Revocation). 1996) ("Revocation Decision") [#647]. Therefore, while the Permittee had prior experience with Act 250 proceedings such that he should have reasonably known of their inherent complexity and serious consequences, he chose to use his own employee as his representative. Indeed, the Board has never received a notice of withdrawal for Ms. Brown and continues to assume that she is one of the Permittee's representatives. See Memorandum of Decision on Motions for Rehearing and to Alter, Certificate of Service.

As the Board noted at length in the Dash 8 Decision at 4-6, the Permittee at no time prior to the hearing advised the Board that he wanted to retain counsel to represent him in this appeal. The issue was not raised in response to the Preheating Conference Report and Order or at the second prehearing conference on February 17, 1998. Only on the very day of the hearing did the Permittee request postponement to allow him time to hire counsel. The Board, after allowing the parties oral argument on the issue, denied the Permittee's request. While it did not expressly rule at that time on the issue of whether the Permittee was provided adequate representation, the record reveals that Ms. Brown had prior experience as the Permittee's representative in Act 250 proceedings and, with the exception of her absence from the initial prehearing conference, she otherwise complied with the Board's various orders and notices. Therefore, if the Permittee has suffered from "strategic and tactical errors" during the course of this proceeding, those errors are the result of his own decision as to how to manage his appeal.[1]

[1] Among the errors identified by counsel for the Permittee are Ms. Brown's failure to draft a comprehensive notice of appeal, raise party status objections, seek a narrowing of the scope of appeal, object to the Prehearing Conference Report and Order, and object to the admission of certain exhibits. Motion to Alter at 3-4, No. 14. The Permittee does

In conclusion, there is no legal basis for convening a new hearing. Even if there were, the Permittee has not persuaded the Board that Ms. Brown was not adequate to the task of serving as the Permittee's representative and, in any event, the Permittee was free to select a representative of his choosing. "Manifest injustice" means that an act or omission of a decision maker is in apparent error. Since the decision to retain Ms. Brown as representative was a decision fully within the control of the Permittee and not the Board, and Ms. Brown did not withdraw as the Permittee's representative at any phase in this proceeding, the Board did not commit manifest error in denying the Permittee's request to postpone the hearing to allow the Permittee to hire legal counsel.

B. Motion to Alter

The Permittee argues that the Board should substantially alter the Dash 8 Decision to eliminate certain findings of fact which pertain to impacts to adjoining properties because they are "retrospective in nature and enforcement oriented." Motion to Alter at 8-9, No. 8 The Permittee generally asserts that the Board, in making such findings, impermissibly exceeded its authority and usurped the power of the court to adjudicate nuisance complaints. Motion to Alter at 6-9, Nos. l-9. The Permittee further argues that the Board misapplied the so-called Quechee standard in evaluating noise impacts under Criterion 8. Motion to Alter at 9- 10, No. 10. Finally, the Permittee makes the vague assertion that because the Board "failed to determine and articulate the generally available mitigating steps which the [Permittee] should have [taken], but did not allegedly take," the Board's conditions are discriminatory and constitutionally suspect. Id. at 10. With respect to all of the above arguments, the Permittee offers no citations to legal authority.

The Permittee apparently fails to understand the purpose and limits of EBR 3 1 (A) and the nature of the matter under appeal to the Board. EBR 3 l(A) allows the Board to consider motions to alter "as may be appropriate with respect to the decision." EBR 3 1 (A)(1) specifically states:

> All requested alterations must be based on a proposed reconsideration of the existing record. New arguments are not allowed, with the exception of arguments in response to permit conditions or allegedly improper use of procedures, provided that the party seeking the alteration reasonably could not have known of the conditions or procedures prior to decision. New evidence may not be sub-

not directly attack the Board's rulings with respect to these matters, because such objections made now would be untimely.

> mitted unless the board or district commission, acting on a motion to alter, determines that it will accept new evidence. (Emphasis added.)

In prior decisions, the Board has clarified what is appropriate in a motion to alter. The motion must seek reconsideration based on the existing record. New evidence is not allowed. New arguments are not authorized, except for objections to permit conditions or use of procedures about which the movant reasonably could not have known prior to the decision. Re: St. Albans Group and Wal*Mart Stores. Inc., #6F047 1 -EB, Memorandum of Decision on Motions to Alter at 3 (Jun. 27, 1995) [#598M]; Re: Taft Comers Associates, Inc., #4C0696-1 l-EB (Remand), Memorandum of Decision at 6-7 (May 5, 1995) [#532R2].

The purpose of the standards concerning motions to alter is to preserve the integrity of the appeal process by ensuring that arguments and evidence are introduced prior to a fmal decision and to prevent the use of motions to alter to convert Board decisions into "proposed" decisions to which parties can later respond, thereby elongating the process. Id.

The Board concludes that the arguments raised by the Permittee are, in the main, new arguments that don't fit within the ambit of EBR 3 l(A), or are arguments that should have been raised at an earlier stage of the proceeding and therefore are inappropriate for consideration by the Board at this time.

The Permittee's first argument is a new argument which is not appropriate for reconsideration. The Permittee asks the Board to apply new legal standards that would require the Board to conduct a new hearing and gather substantially new evidence. The Permittee would have the Board look at his application as though no buildings had ever been constructed at the Project Tract, no uses had occurred, and no impacts to adjoining properties had been experienced. Furthermore, the Permittee would shift the burden to the Board to articulate what generally available mitigating steps the Permittee should apply in order to mitigate the adverse impacts of its Project. In short, the Permittee asks the Board to eviscerate the Dash 8 Decision by striking 49 of its 84 findings of fact. Motion to Alter at 8-9, Nos. 6-7 (May 15, 1998).

The Permittee's arguments could and should have been anticipated prior to the issuance of the final decision given the content of the Corrective Decision and Permit of the Commission. He should have made his arguments at an earlier phase of this appeal, such as in his Notice of Appeal, in objections to the Prehearing Conference Report and Order, or in the Permittee's proposed Findings of Fact, Conclusions of Law, and Order. The Permittee failed to do so.

Even if the Permittee had raised these arguments at an earlier stage of this proceeding, the Board would have advised him that he misunderstands the law applicable to Act 250

proceedings. Before a district commission can issue a land use permit, it must affirmatively find that a project complies with all ten Act 250 Criteria. On appeal, the Board must affirmatively find with respect to the Criteria at issue. 10 V.S.A. §§6086(a) and 6089(a). The burden of production and persuasion are squarely on the applicant with respect to Criterion 1. 10 V.S.A. §6088(a). Even with respect to Criterion 8 where the burden of persuasion rests with the project opponents (10 V.S.A. §6088(b)), the applicant must provide sufficient evidence for the Board to make a positive finding. Re: Herndon and Deborah Foster, #5R089 1-8B-EB, Findings of Fact, Conclusions of Law, and Order at 11 (Jun. 2, 1997) [#665]; Re: Pratt's Propane, #3R0486-EB, Memorandum of Decision at 5 (Jan. 27, 1987) [#311]. Consequently, it is not incumbent on the Board to advise an applicant how to design his project, including what mitigation measures will be acceptable. Re: Bernard and Suzanne Carrier, #7R0639-EB (Reconsideration), Findings of Fact, Conclusions of Law, and Order at 11 (Feb. 4, 1997) [#666]; Re: Herndon and Deborah Foster, at 13 is incumbent on the applicant to provide the Board with sufficient evidence such that if there are adverse impacts, those impacts are not "undue." Such evidence of compliance must be provided *prior* to the issuance of a land use permit.

In instances where the Board is asked to review a project which has already been constructed and is in use, the Board takes into consideration the state of the project and project tract as they exist at the time of review. See Re: Bernard and Suzanne Carrier and Re: Herndon and Deborah Foster. In evaluating adverse aesthetic impacts, the Board considers what mitigation measures, if any, the applicant has used or proposes to use to assure that any impacts are not undue. However, if adjoining property owners who have been granted party status offer evidence and persuade the Board that such mitigation measures are inadequate and that the adverse impacts are undue, the Board may conclude that the application should be denied. Re: Herndon and Deborah Foster at 12-l 4, 16. Alternatively, the Board may conclude that an Act 250 permit can be granted, provided additional mitigation measures are imposed by permit condition. 10 V.S.A. $6086(c); Re: Raymond F. and Centhy M. Duff, #5W0952-2-EB, Findings of Fact, Conclusions of Law, and Order at 10 (Jan. 29, 1998) [#684].

In considering the impacts of the Permittee's Project, the Commission and the Board correctly took into consideration the physical features, buildings, and uses as they existed at the Project Tract at the time of the Dash 8 application review. However, to understand the impacts to adjoining properties that were directly related to the Permittee's operations, the Board considered the testimony of the Neighbors as well as that of the Permittee. The Permittee, having failed to provide the Board with evidence that he had taken reasonable measures in the past to mitigate those impacts, and having failed to provide the Board with a prospective mitigation plan, left the Board in the position where it had to either impose conditions that it deemed necessary and reasonable to alleviate those impacts or otherwise deny the Permittee's application. In this case, the Board chose the former course.

It cannot be said that the present case involves permit conditions that the party seeking alteration reasonably could not have known of prior to the Board's decision. Indeed, an examination of the conditions imposed by the Board reveals that they are substantially like those imposed by the Commission, but are more lenient with respect to certain winter operations. While the hours of operation are more restrictive than those imposed under the prior Revocation Permits, they are designed to address undue adverse impacts where the Permittee himself has failed to provide the Board with his own plan for their mitigation.

The Permittee also argues that the Board misapplied the Quechee standard in evaluating noise impacts generated by the Project. Motion to Alter at 9, No. 10. While this argument might be a basis for granting a motion to alter, the Permittee has failed to elaborate on how the Board misapplied the Quechee standard in light of other Board decisions addressing noise impacts under Criterion 8. Clearly the use of the crusher created an undue adverse aesthetic impact, both with respect to noise and dust. The Permittee offered no plan for how he proposed to mitigate the impacts of its operations. Since the Permittee failed to meet his burden of production, the Board properly denied the crusher's use on a prospective basis.

The Permittee's last and related argument is that the Board's permit conditions are discriminatory and constitutionally suspect because it "failed to determine and articulate the generally available mitigating steps which the [Permittee] should have [taken], but did not allegedly take." Motion to Alter at 10, No.10. As stated above, it is not the Board's duty to offer guidance to a permit applicant concerning what mitigation measures would be generally acceptable. Each case must be decided upon its specific facts. On the other hand, the Board has decided a great many cases dealing with earth extraction and other related operations, and the Permittee was certainly free to study these decisions in light of the decision he received from the Commission and present to the Board his own mitigation plan. He did not. See Re: Pike Industries. Inc., #400008-2-EB (Oct. 23, 1997) [EB #674]; Re: George and Marjorie Drown, #7C0950-EB (Jun. 19, 1995) [EB #607]; Re: Charles and Barbara Bickford, #5W1186-EB (May 22, 1995) [EB #595]. Therefore, the Board concludes that the Permittee has raised an argument which is not appropriate for consideration in a Motion to Alter.

In conclusion, the Permittee has failed to present the Board with a basis for altering its decision pursuant to EBR 3 l(A). Therefore, the Board declines to alter the Dash 8 Decision.

IV. ORDER

1. The Permittee's Motions for Rehearing and to Alter are denied.

2. Jurisdiction over this matter is returned to the District #1 Environmental Commission.

Dated at Montpelier, Vermont, this 24th day of July, 1998.

ENVIRONMENTAL BOARD

Marcy Harding

Marcy Harding
Arthur Gibb
George Holland
Sam Lloyd
Rebecca Nawrath

Board member Martinez participated in the deliberations on June 24, 1998, but was unavailable for deliberations on July 22, 1998. Therefore, he does not join in this decision.